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Before the
Federal Communications Commission
Washington, D.C. 20554

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DEC 16 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:)

TELEPHONE COMPANY-CABLE)
TELEVISION CROSS-OWNERSHIP)
RULES, Sections 64.54-64.58)

and)

Amendments of Parts 32, 36, 61,)
64 and 69 of the Commission's)
Rules to Establish and Implement)
Regulatory Procedures for Video)
Dialtone Service)

CC Dkt. No. 87-266

RM-8221

To: The Commission

COMMENTS OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY

by

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SUMMARY

In the Third Further Notice in this proceeding, the Commission asks for suggestions about how to achieve several specific regulatory objectives. In these comments, SNET suggests a regulatory structure to help achieve two of these objectives.

First, the Commission asks for suggestions about how to regulate analog channel sharing arrangements on video dialtone systems in order to maximize competition in the delivery of video programming to consumers without undermining any other communications policy. SNET proposes to accomplish this objective in the following way:

- A LEC would be permitted to select one of its programmer customers to act as a wholesaler of certain analog channels to all programmer customers using the system to provide programming to consumers.

- In the event more than one programmer customer desires to perform this wholesale function, the LEC would be required to select the entity that would perform this function based on an objective standard under which it weighs each applicant's proposal under the following four criteria:

- its prior experience in the video programming market
- its financial resources
- the price it has negotiated to acquire programming to fill the SCC channel block
- its willingness to enter a long-term contract to perform the wholesale function.

- The programmer customer performing the wholesale function would be entitled to a channel block consisting of up to 30 analog channels, and it would be required to program each of these channels with "popular" broadcast and non-broadcast programming services as measured by an objective standard established by the Commission.

- The program wholesaler would be required to share its channels with all other video programmer customers on a nondiscriminatory and non-profit basis.

Second, the Commission seeks suggestions about how it should identify communities where there may not be an economic justification for independently owned cable TV and VDT systems in the foreseeable future. It asks for comments on this matter because it wants to provide an economic incentive for LECs to construct a VDT system in communities of this sort by allowing the LEC that serves any such community either to purchase the existing local cable system or to jointly construct a VDT system with the cable operator there. SNET proposes in its comments that the Commission identify these communities through a formula which takes into account both population density and average household income in the subject area. A rural area or a low income area are the areas in which independently owned video dialtone and cable systems are most likely unsustainable.

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Dialtone Service)

To: The Commission

COMMENTS OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY

The Southern New England Telephone Company ("SNET") offers suggestions in these comments on two issues about which the Commission seeks comment in its Third Further Notice. First, SNET proposes regulatory safeguards to ensure that video dialtone ("VDT") channel sharing arrangements do not undermine any Commission policy.^{1/} Second, it defines circumstances in which the agency should permit a local exchange carrier ("LEC") to provide VDT service in a community it serves either by purchasing the local cable system or by jointly constructing a VDT system with the operator of that cable system.^{2/}

^{1/} See Memo. Op. and Order on Recon. and Third Further Notice of Prop. Rulemaking at ¶¶ 268-75.

^{2/} Id. at ¶¶ 276-79.

BACKGROUND

SNET has moved as aggressively as any LEC to complete the massive amount of work necessary to provide VDT service on a broad scale. For example, it has obtained Commission approval to provide VDT service on a trial basis to nearly 152,000 households -- more than any other LEC. The Commission granted this authorization by approving two SNET applications to conduct VDT trials. The first application sought authority to serve 1,600 households in West Hartford, Connecticut. It was granted 13 months ago.^{3/} The second sought authority to expand service to an additional 150,000 Connecticut households, and it was granted last month.^{4/} Not only has SNET been authorized to provide trial VDT service to a large number of households, it also has begun its first VDT trial and has completed deployment of much of the infrastructure for the expanded trial, which it hopes to begin early next year.^{5/}

Most VDT systems, including SNET's 550 MHz system, will have limited channel capacity for the short term since two factors will force them to rely substantially on analog transmission technology for several years. First, some equipment necessary to transmit and

^{3/} The Southern New Eng. Teleph. Co. (FCC 93-473, rel. Nov. 12, 1993).

^{4/} The Southern New Eng. Teleph. Co. (FCC 94-297, rel. Nov. 22, 1994).

^{5/} Last March, SNET began deployment in the expanded trial area of the transmission facilities it will use in providing both VDT and telephone service there. However, it did not begin deploying facilities useful only for VDT service until after the Commission approved its application last month to provide VDT service in this area. Id.

receive digitized video signals may not be commercially available until the last half of 1995. In addition, it will be economically undesirable for the foreseeable future to digitize all channels since full digitization at an earlier time would depress demand for VDT service. This is because a television household desiring digitized video programming must obtain a special television set-top converter which is likely to be expensive for the foreseeable future.^{5/} In view of these facts, SNET intends to offer roughly 75 video channels when it initiates VDT service in its expanded trial area. The company will slowly increase total channel capacity by digitizing some bandwidth as economics and technological developments justify it. Each channel that SNET digitizes should increase total system capacity by at least six channels. Eventually, SNET's system may consist entirely of digitized bandwidth, thereby producing more than 500 video channels.

The FCC proposed in its Third Notice one amendment to its VDT rules designed to help ensure that VDT systems can compete with cable TV systems quickly and another amendment to help ensure that VDT systems compete with cable TV in more communities than might otherwise occur. In order to speed VDT competition with cable, the

^{5/} The Commission has been informed that the purchase price of each such converter may be about \$300 and that the monthly rental price may be about \$15. See Comments of The Indep. Data Commun. Manufacturers Ass'n at 4-5 (May 12, 1994) (opposing petition by Bell Atlantic for waiver of Sec 64.702(e) of Rules to bundle the offering of VDT set-top converters and VDT service); Reply Comments of Bell Atlantic at 3-5 (May 27, 1994) (responding to cost estimates by discussing market research showing that consumer demand for VDT service could be depressed by more than 30 percent if all consumers must pay this much for converters).

Commission proposed to let LECs require that their video programmer customers share certain channels, and it asked commenters to propose regulations to help ensure that these channel sharing arrangements do not undermine any other Commission policy. The Commission concluded that competition in providing video programming to consumers could be needlessly slowed unless it required channel sharing by video programmers since VDT channel capacity will be limited in the short term for the reasons described above.^{1/}

To increase the number of communities in which VDT systems are deployed, the Commission proposed to let LECs either purchase the existing cable system or jointly construct the VDT system with the cable operator in areas that may be incapable of supporting unaffiliated cable and VDT systems, and it asked for comments on how to identify these areas. The agency concluded that deployment of VDT networks could be unnecessarily delayed in such areas in the absence of a rule of this sort.^{2/}

ARGUMENT

I. The Commission Can Facilitate Competition in the Delivery of Video Programming Without Harming Any Other Regulatory Policy By Regulating Channel Sharing in the Manner Described Below

The Commission may facilitate competition in the delivery of video programming without harming any other communications policy by adopting a few simple regulations to govern channel sharing by video programmers. In Part A below, we describe those regulations.

^{1/} Further Notice, supra. at ¶¶ 271-75.

^{2/} Id. at ¶ 276-79.

In Part B, we explain why these regulations are compatible with existing regulatory policies.

A. Competition Can Be Furthered by New Regulations Governing Selection of a Single Company to Provide Shared Channel Service to All Video Programmers and Defining Terms Under Which This Company Shares Its Channels with All Video Programmers

The Commission should permit each LEC to select a single video programmer to act as a wholesaler of certain programming to all video programmers who use the LEC's VDT system to provide programming to consumers. In these comments, SNET will refer to the customer who performs this wholesaler function as the "shared channel customer" or "SCC." It will refer to customers who provide video programming to consumers as "video information providers" or "VIPs." The SCC most likely will be both a VIP and a wholesaler. The SCC would be regulated as any other VIP in its role of providing video programming to consumers. The regulations that SNET proposes below would govern this customer in its role as SCC.^{2/}

1. Regulations Governing Selection of the SCC

The Commission should ensure that the SCC is selected fairly if more than one party desires to act as the SCC. This can be done by adopting a rule requiring the LEC to select the SCC based on an objective standard designed to ensure the availability of high-quality programming service to all of the LEC's VIPs. This stan-

^{2/} In order to ensure that these regulations end when the justification for them goes away, the agency should consider banning VDT channel sharing arrangements on any fully digitized VDT system. Full digitization of VDT channel capacity eliminates the need for channel sharing in order to ensure substantial competition in the delivery of video programming via VDT systems.

dard should allow the LEC to make its decision based on each applicant's (a) prior experience in the video programming market, (b) financial resources, (c) negotiated program acquisition costs to fill the SCC channel block, and (d) willingness to enter a long-term contract to act as the SCC. If no one desires to act as the SCC, the Commission should allow the LEC to do so.

2. Regulations Governing Programming Carried by
the SCC on Its Channel Block

The Commission should adopt two regulatory requirements involving the type of programming provided by the SCC to VIPs in order to ensure that the SCC provides programming most likely to reduce duplicative channel requests to provide identical programming to consumers. First, the Commission should allow LECs to provide up to 30 analog channels to the SCC. This will ensure that the number of channels available for sharing is sufficiently large to minimize such duplicative channel requests. Second, the Commission should require the SCC to carry only popular programming on these 30 channels as measured by regularly published surveys. The agency could require that channel popularity be measured in any of several ways, but it should keep the measurement criteria simple and reflective of local viewing patterns. For example, it could require the SCC to fill its channel capacity from a universe of programming consisting of (1) broadcast stations which are "significantly viewed" (as defined by Section 76.54 of the agency's Rules) in the area served by the VDT system, and (2) the 30 cable television channels with the largest viewership in the market where the VDT system is located as measured by regularly published A.C.

Nielsen ratings.^{10/} The SCC should be permitted, but not required, to adjust its programming lineup annually based on changes in relative viewing popularity among cable programming services.^{11/}

3. Regulations Governing the Terms Under Which the SCC Must Share Its Channels with VIPs

The Commission should impose three regulations on the SCC which are not imposed on other video programmer customers in order to ensure that all VIPs have access on reasonable terms to the SCC's programming. First, the SCC should be required to resell its programming on a common carrier basis to any VIP desiring to incorporate any of the SCC's channels in the programming service it offers consumers. Second, while the SCC should be permitted to

^{10/} For markets where viewership ratings of non-broadcast stations are not regularly published, the Commission could measure popularity through some other means. For example, it could use the Nielsen ratings of an adjoining market, or it could base channel popularity on nationwide monthly cable subscribership as reflected in the annual Broadcast & Cable Yearbook.

^{11/} A requirement that the SCC fill its channel block with popular channels restricts the SCC's First Amendment rights far less than "must carry" rules restrict a cable system's First Amendment rights. First, SNET's proposal leaves SCCs with substantial discretion to decide what channels to carry whereas "must carry" rules do not. Second, SNET's proposal demonstrably serves the objective for which it is proposed whereas "must carry" rules do not. It is plain on its face that SNET's proposal would accomplish its objective to promote competition in the provision of video programming to consumers by ensuring that programming most likely desired by multiple VIPs is available in a manner that economizes use of limited channel capacity. By contrast, while "must carry" rules ostensibly are intended to preserve over-the-air broadcasting, the Supreme Court has noted that it is not clear that they accomplish this objective. Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2470-72 (1994). Finally, SNET's proposal, at most, restricts the First Amendment rights only of those who decide voluntarily to become SCCs whereas "must carry" rules restrict the First Amendment rights of all cable operators.

resell its programming to VIPs at a price which allows the SCC to recover all of its costs, the SCC should be prohibited from reselling to these parties at a profit.^{12/} Third, the SCC should be required to resell its programming to VIPs on a channel-by-channel basis.^{13/}

B. These Regulatory Requirements Are Consistent with All Other Commission Policies

The straightforward channel sharing rules described above not only would help ensure substantial competition in the delivery of video programming to consumers, they also are consistent with other communications policies.

First, a LEC with a channel sharing arrangement that complied with these requirements would not violate Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). That provision prohibits a LEC from offering a common carrier service, including VDT service, on terms that are unreasonably discriminatory. A LEC would abide by Section 202(a) in complying with regulations proposed by SNET since the SCC and all VIPs would lease channel capacity from the LEC on the same terms. Moreover, any concern that the LEC might be engaged in unreasonable discrimination by selecting the

^{12/} If the SCC itself acts as a VIP by providing a video programming service to consumers that includes some or all of the 30 channels of programming on the SCC's channel block, the SCC obviously would be required to obtain access to these channels on the same terms as any other VIP.

^{13/} Although all VIPs should be required to obtain from the SCC any programming available from the SCC which they want to include in the service they offer to consumers, they also should be allowed to provide consumers entirely with programming that is unavailable from the SCC.

SCC would be moot in most cases. This is because it is unlikely that more than one party would seek to become the SCC since the SCC would be barred from reselling its programming to VIPs at a profit. A LEC's selection of the SCC in the rare circumstance where more than one party desired that responsibility still would not violate Section 202(a) since that provision bars only acts of discrimination which the Commission finds "unreasonable". The Commission plainly may hold that a LEC selecting the SCC in accordance with the objective criteria identified above would not be engaged in "unreasonable" discrimination.

Nor would a LEC with a channel sharing arrangement that complies with the requirements described above violate the telephone/cable cross ownership provision in Section 613(b) of the Communications Act, 47 U.S.C. § 533(b). This provision bars a LEC from "determin[ing] how video programming is presented for sale to subscribers, including making decisions concerning the bundling or 'tiering' of programming or the price, terms, or conditions on which the programming is offered to subscribers."^{14/} Under SNET's proposal, the LEC would not determine how video programming is presented for sale to subscribers since the LEC would not sell programming to subscribers. Instead, the LEC would only lease channel capacity to VIPs and to the SCC. These customers, subject to FCC requirements described above, would make all decisions about the terms under which programming is offered to consumers. These decisions would include the nature of the programming offered and

^{14/} Further Notice at ¶¶ 64, 74.

the prices that consumers must pay to receive this programming. The LEC would have no authority to determine any term under which any VIP offers any channel to its subscribers.

If the LEC alone is willing to act as SCC, the Commission may authorize it to do so in this proceeding consistent with Section 613(b) even though, as SCC, the LEC arguably might affect terms under which programming is offered to subscribers by selecting programming for the SCC channel block. Under paragraph (4) of Section 613(b), the Commission may permit LECs to engage in activities otherwise barred by that section if the Commission concludes that there is "good cause" to do so. There would be "good cause" to permit a LEC to act as the SCC if no one else desired to do so because the risk is plainly outweighed by the benefit. The risk would be minimal because the LEC still would be prohibited from providing video service directly to subscribers and in its role as SCC would be subject to all regulatory requirements applicable to SCCs. By contrast, the public would benefit greatly from added competition in the delivery of video programming since a LEC would be permitted to act as SCC only if no other qualified party were willing to do so.

II. The Commission Should Adopt a Formula Based on Population Density and Income Level to Define Areas in Which the LEC May Provide VDT Service Either by Purchasing the Local Cable System or by Jointly Constructing VDT Facilities with the Operator of that System

SNET supports the method by which the Commission proposes to encourage LECs to construct VDT systems in communities where they might otherwise have little economic incentive to do so. Under the

Commission's proposal, LECs could provide VDT service in these communities either by purchasing the local cable system or by jointly constructing a VDT system with the local cable operator. At the Commission's request, SNET proposes a method by which the agency should identify the areas in which LECs should be permitted to provide VDT service through these means.

First, the Commission should identify areas in which joint VDT construction and cable system acquisition are permissible by adopting a formula which takes into account both population density (e.g. homes per route mile) and average household income in the subject area. The Commission has long recognized that a community with a low population density is less able economically to justify the large investment necessary to provide multi-channel video distribution networks than a more densely populated area.^{15/} Communities with income levels that are substantially below average likewise are less likely to be able to sustain such investment.

Second, although these two factors should describe the areas where either cable acquisition or joint VDT construction are permissible, the formula should permit joint construction in more areas than it permits acquisition. This is because joint construction reduces potential competition in the video market less than acquisition. If a cable operator and LEC jointly construct a VDT system in the cable operator's service area, the cable system

^{15/} See, e.g., Rules Implementing Cable Commun. Policy Act of 1984, 58 Rad. Reg. (P&F) 2d 1, 17-19 (1985) (allowing LECs to provide cable TV service in an area where they provide telephone service as long as the area has a population of less than 2,500).

remains a competitor to the VDT system. By contrast, if the LEC purchases the cable system, the cable system is replaced by the new VDT network.

Finally, the LEC and subject cable operator should have discretion to determine the geographic area to which the formula would be applied as long as the area they define follows boundary lines established for other purposes. In some cases, a cable operator and LEC may desire to engage in joint construction in some, but not all communities in the cable operator's service area. There is no reason for the Commission to insist that this formula be applied to geographic areas of a particular size or areas that meet some other specific criteria as long as the area selected by the LEC and cable operator conforms with boundaries established for other purposes (e.g., cable franchise area or LEC wire center) and meets the population density/income level standard referred to above.

CONCLUSION

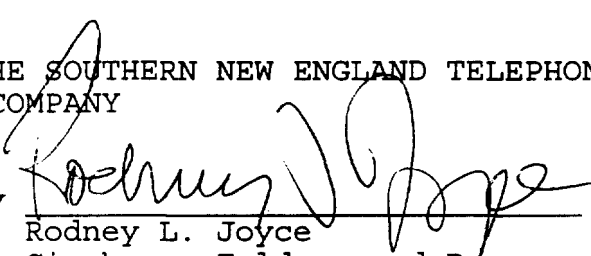
The Commission may help ensure substantial competition in the delivery of video programming to consumers by allowing a single customer of each LEC to lease and program a block of analog channels for sharing by all VIPs subject to regulations governing (1) selection of this customer, (2) selection of the programming it carries, and (3) the terms under which it shares its programming with VIPs. If the Commission permits channel sharing on the basis that SNET proposes, no other communications policy would be undermined. The Commission may facilitate more rapid deployment of VDT

networks in communities where deployment may be economically questionable by allowing LECs to provide VDT service either by purchasing the cable system that serves this area or by jointly constructing with the operator of the cable system a VDT network to serve that area. The agency should identify areas in which acquisition or joint construction is permissible through a formula that takes into account the population density and income level in the subject area.

Respectfully submitted,

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